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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 75-117

BARNEY ROSS and RICHARD VASQUEZ, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARVIN O. TEAGUE
Counsel for Petitioners
999 State National Building
412 Main Street
Houston, Texas 77002

JON HUGHES
Counsel for Petitioners
609 Fannin
Houston, Texas 77002
225-0666

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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The Petitioners, BARNEY ROSS AND RICHARD VASQUEZ, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on

OPINION BELOW

The Court of Appeals' opinion was Per Curiam, see 510 F.2d 383, and is an unpublished opinion. A copy of same is set out in the Appendix, infra, page 33. The Petitioners' Motion for Rehearing was denied without opinion. A copy of the Court's order pertaining thereto is set out in the Appendix, infra, page 36.

JURISDICTION

The opinion of the Court of Appeals was handed down on March 7, 1975. Thereafter, the Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

AS TO PETITIONER VASQUEZ ONLY

1) Whether, under the facts and circumstances of the case, the introduction of an extraneous criminal wrong, of the Petitioner Vasquez, allegedly committed on City of Houston, Texas police officer T. J. Smith, at a time and place removed from the facts of this cause, violated Petitioner Vasquez' rights under the Fifth and Sixth Amendments?

2) Whether the trial court judge violated Petitioner Vasquez' rights under the Fifth and Sixth Amendments by entering a pre-trial order prohibiting Petitioner and his counsel from asking questions and giving answers and testimony which would have shown the Petitioner did not know that the complainants, Federal Agents Parsons and Alvarez, were in fact Federal officers, who were allegedly assaulted, and which assaults were made the basis of the charge against the Petitioner Vasquez?

AS TO PETITIONER ROSS ONLY

1) Whether the trial court judge violated Petitioner Ross' rights under the Fifth and Sixth Amendments by entering a pre-trial order prohibiting Petitioner and his counsel from asking questions and giving answers and testimony which would have shown the Petitioner did not know that the complainants, Federal Agents Parsons and Alvarez, were in fact Fed-

eral officers, who were allegedly assaulted, and which assaults were made the basis of the charge against the Petitioner Ross?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury * * *; nor shall any persons * * * be deprived of life, liberty, or property, without due process of law. * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * *.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 111, provides:

> Assaulting, resisting, or impeding certain officers or employees.
>
> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000.00 or imprisoned not more than three years, or both."
>
> "Whoever, in the commission of any such acts uses a deadly or dangerous weapons, shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both."

Among the persons "designated in section 1114" of 18 U.S.C. is "any officer or employee . . . of the Bureau of Narcotics and Dangerous Drugs."

SUMMARY OF THE FACTS OF THE CASE

Though the trial was long, with much evidence presented by both sides, the facts are relatively simple with antagonistic positions presented therefrom.

The Statement of Facts, from the Government's position, reveal that Nick Fatta of the League City, Texas Police Department arrested one Paul Sams on June 16, 1972, at Sams' residence, being Apartment 3-A, at the Diamond Apartment complex in League City, Texas, which was the scene of the altercation made the basis of this lawsuit, for State criminal offenses of unlawful possession of marijuana. (896-897).[1] Thereafter, pursuant to an agreement between Sams and Fatta, Fatta agreed to have the State criminal charges against Sams dismissed if Sams would become a cooperating agent or Informant for the League City Police Department. The criminal charges were subsequently dismissed against Sams. (903). Sams did agree to become a cooperating agent or Informant and, on July 2, 1972, Sams called Fatta on the telephone and then talked to a person by the name of Ross Hart. (836, 900). Further phone calls occurred. The object of Fatta's desire was one Ervin Holms, who, however, played no part in this cause. (907) However, Ross Hart soon become the object of Fatta's plans and desires. This resulted from Sams relaying information to Fatta about a possible delivery of marijuana through Hart.

1. The following page numbers refer to the Reporter's Original Statement of Facts.

Sams was not the usual confidential informant as he was a first time unproved informant for this case. In fact, Fatta was not convinced that Sams would tell him the truth when he had conversations with him. (936, 1035). Also Officer Mulligan of the League City Police Department was not sure of Sams' reliability or credibility. (1288). Sams worked for D.A.L.E. (310). Alvarez knew nothing about him. (240, 242, 311, 1150). None of the Federal agents involved were D.A.L.E. personnel.

On July 8, 1972, Fatta contacted Agent Wedeman of the Bureau of Narcotics and Dangerous Drugs, to invite that Federal Agency to do a follow-up to the source of an investigation. (474-475). A meeting for the next morning, at the League City Police Department, between the State and Federal Agents was agreed upon. (420, 427, 502). Wedeman called Alvarez, the Complaining Witness in the Vasquez case, (236), and told Alvarez to be at the League City police station the next morning. (474, 475).

Mario L. Alvarez testified that he, Wedeman, and Parsons of the Federal Agency met with Fatta, Mulligan and Carleton of the League City Police Department at the League City Police Station at approximately 7:30 O'Clock A.M. on July 9, 1972. (191, 193, 194). An orientation-surveillance "to-be-set-up" session occurred. Sams was also present. (420, 427, 502). The objective of the police at this time was the arrest of Ross Hart. (366, 601).

The group then went, after the meeting, around 10:30 or 11:00 O'Clock A.M., to the Diamond Apartments in League City, Texas. (196). Alvarez drove a pick-up with a camper attached thereto. Wedeman, Fatta, Mulligan

and Carleton rode in the rear thereof. Parsons, with the Informant, Sams, went to the apartments in a Dodge undercover automobile. (350). After arrival, those in the camper remained therein. Alvarez would, on occasion, get out and lift the hood of the truck.

Parsons and Sams, after their arrival, went first to Sams' apartment, 3-A, (619), and then went to apartment 6-C, a vacant apartment. Parsons was to act as an agent of Fatta, who was to act as the middleman to get delivery of fifty (50) pounds of marijuana. (620). Sams left apartment 6-C. Parsons remained inside.

Around noon, Sams returned from wherever he went and then Sams and Parsons both left and went to a service station where Sams dialed a number on a telephone, spoke to someone and then Parsons had a conversation with that [unidentified] persons. (627). Inquiry was made over the telephone as to whether the delivery of the marijuana was going to occur that day or the next day. (628).

Apparently, prior to Sams and Parsons leaving the apartments, Parsons "waived" off Alvarez and those in the camper. (325, 346, 432). All persons returned to the police station. (200, 201).

While at the police station, Fatta talked with a person, who identified himself as Ross Hart, over the telephone. He also had a conversation with another [unidentified] person. (830).

All of the law enforcement personnel returned to the apartment complex around 2:15 O'Clock P.M., (202), and a second surveillance, like the first one, was set up. (436). Parsons and Sams were in Parsons' car. (350).

Parsons went inside Apartment 6-C. The Officers were still in the camper with Alvarez still the driver of the camper. The objective was to arrest Ross Hart. (281, 357, 383, 601).

The officers had a pre-arranged signal. If the trunk of Parsons' undercover vehicle was raised, this meant that the marijuana had been delivered, (275, 439), and this was the signal to arrest the person opening the trunk, (245, 257, 1121), as well as anyone else in the area. (930).

Between 3:00 O'Clock and 3:45 O'Clock P.M., (352, 437), but after 3:45 O'Clock P.M., (360, 374), activity at the apartment complex picked up, (635), when several automobiles appeared at the apartment complex at or about the same time. (635). A red Ford automobile drove up, (208), and parked next to Parsons' undercover automobile. (208, 350). Alvarez identified Petitioner Ross as being the driver of this vehicle. (217). Another automobile, a green Plymouth, containing two Latin-American males, drove up, stopped and Petitioner Ross got into this car. (218, 362). The green Plymouth then left and later returned. Petitioner Ross got out of the car. (221, 367). The vehicle then continued moving. (368). A green Camaro also drove up and parked. The Government Informant, Sams, Ross Hart and Petitioner Vasquez were in this automobile. (256, 367). Petitioner Ross walked over to this automobile. (369). Ross Hart, Sams, and the Petitioners Ross and Vasquez then started walking towards Apartment 6-C, (369), but actually went into Apartment 3-A. (637).

However, Petitioner Ross detoured from the direction of Apartment 6-C and went and got into the Red Ford

and backed it up next to where Hart's green Camaro was parked. (377). Ross got out of his car, the Red Ford, then went and opened the trunk of this car. (379). Petitioner Vasquez and Sams then took something from the trunk thereof and went inside the apartment, 6-C, with each carrying a green paper bag. (228, 381, 2033). Shortly thereafter, Petitioner Vasquez and Sams then walked from the apartment, 6-C, to Parsons' automobile. (229).

While Petitioners Ross and Vasquez were in the apartment with Hart, Parsons and Petitioner Vasquez had a conversation wherein Vasquez told Parsons he wanted to see the money before he brought the marijuana into the apartment. (624, 644). Parsons, however, wanted to see the marijuana first, (229), before he produced the money. (644).

Ross Hart and the Petitioners then left the apartment, 6-C, and went outside. Sams and Parsons remained inside. Within five (5) minutes, Petitioners and Hart returned to the inside of the apartment, 6-C, with each carrying a shopping bag which shopping bags contained smaller bags therein. (647). The shopping bags were taken into the bathroom where the smaller bags were taken out of the shopping bags and counted. One bag was opened. The bags contained marijuana. A discussion concerning delivery of marijuana in 300 pound lots was also had. (661). At this time, as mentioned, see supra, due to Petitioner Vasquez wanting to get the money, he and Sams left the apartment. Hart remained in the bathroom. Parsons and Petitioner Ross were also in the apartment at this time. Within three or four minutes Parsons heard gunfire, at which time he came out of the bathroom into the den, where he first identified himself as a police officer by

saying: "police—hold it." (677). He placed Hart under arrest and then noticed Petitioner Ross facing him in a kneeling position with a gun in his hand. (674).

After Parsons' exclamation, Petitioner Ross fired his pistol five (5) times at Parsons. (677). Parsons then fired his pistol five (5) times at Ross. (678). Parsons was not struck. See also 280, 401, concerning Alvarez' arrival in the apartment. He handcuffed Sams and removed him to the police station. (281).

After Petitioner Vasquez and Sams left the apartment, 6-C, see supra, they then went to Parsons' car. When Sams commenced opening or attempting to open the trunk of the automobile, (385, 438, 1343), Alvarez notified the officers in the rear of the camper by saying to them: "Go," (258), or "The trunk is up," (440), or "Here comes Sams." "He's got somebody with him." (962). Alvarez got out of the front of the pick-up, (386), and Wedeman, Fatta, Mulligan and Carleton got out of the rear of the camper, and they all then proceeded with guns drawn, toward Parsons' undercover vehicle. (259).

All of the officers were dressed undercover style. (191).

Fatta yelled "Police", (976), as did Mulligan, (1064), although it was previously agreed between the officers that only Fatta was to make this exclamation. (392). The Informant yelled "Machine Gun," (926), and then fell to the ground. Petitioner Vasquez, when his attention was directed to the group descending upon him, pulled a gun out from his shirt, (261, 391, 1379), and the shoot-out at the Diamond Apartments commenced. Except for the interior of Apartment 6-C and the persons of Petitioners Ross and Vasquez, none of the bullets

apparently were destined to hit anything as no other things, items or persons were struck by the gunfire.

Alvarez testified that Vasquez pointed a gun at him and fired a total of four rounds. (443). Wedeman also fired his pistol at Petitioner Vasquez. (447). Before Alvarez got to Petitioner Vasquez, Wedeman got there first, (267), and seized Government Exhibit Number 5, the Pistol Vasquez had which was then located beside his body. (449). Vasquez was hit three (3) times. (394). Alvarez then went to apartment 6-C. (272). It appears Mulligan's bullets struck Vasquez. (1180, 1188).

When Fatta got out of the camper with his gun drawn, he tried to fire it but it would not fire because the safety jammed. (857). He never got to fire his pistol. While going towards the direction of Vasquez and Sams, Fatta heard gun-fire coming from the apartment area and he then went in that direction and went inside apartment 6-C. (1000).

The actions of all the law enforcement personnel were without any type legal warrants and, until the shooting occurred, nothing of an illegal or unusual nature had occurred at the scene. (586). "Well, until we received a signal [of the trunk going up], we didn't know there was actually a violation of the law." (235, 246, 606, 912, 1133, 1269).

Also, none of the law enforcement officers knew either of the Petitioners nor had any of them anything to do with Petitioners prior to the day in question. (702, 1029).

The Informant, Sams, was arrested and taken to the League City Police Station, as was the marihuana. He was shortly thereafter released. (281).

Sams was an Informant for D.A.L.E. and not the Bureau of Narcotics and Dangerous Drugs. (240, 242, 311, 1150).

Petitioners Ross and Vasquez were removed from the scene of the altercation by ambulance.

The Petitioners' defense was quite simple but, by the jury's verdict, not acceptable. Ross Hart had previously worked at the Diamond Apartments where he came into contact with Paul Sams in May, 1972. Sams did not testify during the trial of this Cause. Sams borrowed $30.00 from Hart. (1509). Thereafter, Hart ceased to work at the apartments but later returned to work there. When Hart would see Sams, he would make inquiry of Sams about payment of the $30.00 loan. (1510). In order to pay the money back, Sams, a Negro, induced Hart, a white, to aid him in completing some sort of "negotiations" with another person. There was a need for a person of the white race to be involved in the "negotiation." The only part Hart was to play was to be a "dummy" and just be present. (1515). Hart, however, thought that Sams was acting as an agent for the police, (1519, 1694). Several phone calls were made to a person who held himself out by the name of Jack Rafino, which person actually was Fatta. The final "negotiation" was to take place on Sunday, July 9, 1972, (1521), at the Diamond Apartments. (1522).

Sams also asked Hart if he knew anyone who wanted to sell pistols which had not been stolen as he desired to purchase such pistols. (1523). Hart called Petitioner Ross and received an affirmative reply regarding the possible sale of a pistol. (1523, 1727). Apparently, Petitioner Ross inquired of Petitioner Vasquez if he had a

pistol for sale and also received an affirmative reply. (1727).

On Sunday, July 9, 1972, Appellant Vasquez, Hart and two other persons, Helke and Parker, went to Petitioner Ross' parents' home in Houston, where they previously had agreed to meet and then were planning to leave to go surfing at Galveston. (1525). The record reflects, by inference, that only Ross, Vasquez and Hart were aware of the fact that the parties, who were in three separate automobiles, driven by Ross, Hart and Helke, were going to first stop at the Diamond Apartments where Hart was to get his money from Sams and Petitioners Vasquez and Ross were going to possibly sell their pistols to somebody. Helke and Parker were aware the parties were going to stop but they did not know why or where. (1713).

After arrival at the apartments, Hart and Petitioner Vasquez got out of Hart's car, which they were in, and met Sams, who invited them into his apartment, 3-A. (1832). Hart inquired of Sams about his loan of money; the $30.00. Sams said he would have the money shortly. (1578). The three of them then left the apartment with Sams and Hart each carrying a shopping bag. These shopping bags were put in the back seat of Hart's automobile. (1581, 1841). They all got in this automobile. Hart then drove the automobile a short distance and parked it. During this time, Petitioner Ross had also moved his automobile. Hart and Sams then got out of the car and went into apartment 6-C. Vasquez, after getting the two pistols from the trunk of Petitioner Ross' automobile, then went inside the same apartment. Sams had a conversation with someone behind a bedroom door in the apartment. Sams and Hart then went outside the apartment to Hart's automobile where they got the shopping

bags from the automobile of Hart, took them inside apartment 6-C and then put them in the bathroom. (1592-1595). Vasquez also went outside the apartment. Shortly, thereafter, he and Ross came into the apartment. An agreement was reached between Sams, Ross and Vasquez whereby Sams agreed to purchase the pistols from Vasquez and Ross. (1870). Thereafter, Sams and Vasquez went outside, presumably to get the money for the purchase of the pistols. Ross and Hart remained in the apartment. (1598, 1867). Almost immediately, after Sams and Vasquez left the apartment, a sound resembling firecrackers going off was heard. (1877). At this time, Parsons came bursting into the den of the apartment, (1880), from the rear or bedroom thereof, with his gun drawn. He fired his gun four times at Ross, ran across the room and grabbed Ross by the lapels of his coat. His pistol then went off a fifth time. Parsons then picked up Ross' pistol, Government Exhibit 7, and fired it five (5) times into a wall, (1601), which was in the direction from which he had just come. Hart testified that the other officers then came into the apartment where they abused, beat upon and mistreated him and Petitioner Ross. (1606). An ambulance came and removed Petitioner Ross to a hospital. Hart was taken to League City jail. (1606, 1663).

Helke and Parker had remained in their car while Petitioners Ross and Vasquez were doing their thing with Sams and Hart. (1532, 1979, 1992). Finally, Petitioner Vasquez came outside and told them that it would be a few minutes before they could leave. Helke and Parker then decided to go to a drive-in in their car, which was nearby, to get something to drink. (1994). As they returned to the apartments, from the drive-in, Helke and

Parker then saw the commencement of the Diamond Apartments' Shoot-Out, (1997, 2046), together with seeing whom they thought was Petitioner Vasquez getting shot. (2056). Helke testified that he and Parker then kept going and went first to a service station where they called the League City Police, (2060), and reported what they had seen. They then returned to Houston where they called Petitioner Ross' father. (2061).

Dr. Eddie Matsu testified regarding his treatment of Ross, (2175, 2182), which he rendered on July 9, 10, 11, 12and 13, 1972. (2217). A Dr. Shaw subsequently treated Ross for his injuries.

Ross, father, B. J. Ross, Sr., testified, (2232), generally as to that Sunday, July 9, 1972, when his son, Petitioner Ross, and the others were at his house and then left to go surfing at Galveston. He also testified to receiving a telephone call that day, July 9, 1972, from Helke, advising him of what had earlier happened. (2240). He later went to Ben Taub General Hospital in Houston to visit with his son, after making severeal telephone calls trying to locate his son. He finally received a phone call from someone at Ben Taub, (2241) informing him of his son's whereabouts. He testified that when he first saw his son, the Petitioner Ross was exteremely beat up. (2243). He also testified that he had conversations with Mulligan and Wedeman regarding the return of the Ford automobile and filing of criminal charges against his son. Wedeman told him: "The Federals are not going to file any charges." "He [Wedeman] said, "I wished I hadn't went down there." "That was the worst 'botched' deal I ever saw." (2254).

Mr. Ross also testified that he went to the Diamond Apartments, met Steinocher, a photographer, and testfied

the two of them took several photographs, (2255), of the scene. He also testified to his observations he made while at the apartments.

On cross examination, the Government was permitted, over objection, to question Mr. Ross concerning a 1942 conviction for draft evasion, (2268-2274), as well as his business interests. (2276). (See also 2621).

Parker also testified. (2322). His testimony is cumulative to the testimony of Helke. However, he testified that later, on the day in question, he did return, alone, in his girl friend's car, Ms. Myklebust, to the apartments, (2343), and went to apartment 3-A, and asked for Sams but neither met nor saw Sams. (2345). Parker also testified that he and Helke drove to the Ross' residence from League City and told Mr. Ross, Sr., what he had seen. (2395).

Petitioner Vasquez also testified. (2421). He testified that his brother-in-law brought him to the Ross' residence on the day in question. (2425). He identified Government's Exhibit No. 5 as the pistol he brought with him that day. (2426). Petitioner Ross earlier had asked him if he had a pistol he wished to sell and, as he needed the money, he agreed to sell his pistol. He met Petitioner Ross, who also had his pistol and a holster, Government Exhibits 7 and 13, and they put the pistols and the holster in the trunk of Ross' red Ford automobile. Ross Hart then arrived. Petitioner Vasquez then got into Hart's car. Helke and Parker, who had been inside the house, came outside and got into Helke's car. Petitioner Ross got into his car. Everyone, in their respective cars, then left for Galveston to go surfing with the planned stop, in between Houston and Galveston, at the Diamond Apartments, for Hart to

get his $30.00 and Petitioners Ross and Vasquez to sell their pistols. (1578). After arrival at the apartments, Vasquez and Hart got out and saw Sams. After a conversation between Hart and Ross, Ross then moved his car, which was parked behind Hart's car, ao another location. (2439). Sams, Hart and Vasquez then went inside Apartment 3-A. (1832). After being in the apartment for approximately five (5) minutes, Hart, with one shopping bag, Sams, with two shopping bags, and Vasquez then left the apartment and went inside. (1581, 1841). Vasquez went outside first. (1838, 2440). Ross was outside and had been standing behind the Helke car. When Vasquez walked out of the apartment, Petitioner Ross asked Vasquez a question and Vasquez told him: "It would be a few minutes." (2441). Ross then walked away and Helke then backed his car out to go to the drive-in. See supra. Vasquez then got into Hart's car, in the driver's seat, Sams got in the passenger's seat and Hart got in the driver's seat. Hart then moved the vehicle nearby to another location. (2443). All of them got out of the car. Ross then got in his car. He then drove and parked it nearby. Sams, Hart and Vasquez then got out of Hart's car. Vasquez then had a conversation with Ross telling him that Sams was going to buy the pistols. (2445). Petitioner Ross then went to the trunk of his car, got the pistols, and then handed the pistols to Vasquez. Vasquez then started walking between two buildings of the apartment complex. Hart called to him from an apartment. Vasquez then went into Apartment 6-C. Ross went back and got into his car. Vasquez came out of the apartment, went to Ross' car, and told Ross it would be a few minutes. Hart and Sams then returned to Apartment 6-C, with the shopping bags, (2448), which bags came from the back seat of Hart's car. (1851, 2578). Then Ross and Vasquez walked into

the apartment. (1866). Shortly thereafter, Vasquez heard Sams having a conversation with someone. (Parsons). (1852). Then Sams came into the den or living room area where Vasquez and Ross were. The parties further discussed the matter of the purchase of the pistols. (1870). Sams and Vasquez then walked outside the apartment. Ross and Hart remained inside. (1598, 1867). Vasquez thought they were going to get the money for the pistols. Sams had Vasquez' pistol at this time, but Vasquez got it back from Sams as he didn't want Sams to get attached to it until he, Vasquez, had the money. Sams and Vasquez then went to the trunk of a car. [Parsons']. Sams started to open the trunk of the car. This, as earlier noted, was the triggering device for the shoot-out at the Diamond Apartments. (2452). See supra.

Vasqeuz also testified that he bought the pistol, Exhibit 5, from Elroy Jackson, on June 25, 1972, at Produce Row in Houston. (2461).

During the cross examination of Petitioner Vasquez, he was questioned, over objection, (2467-2471), 2503-2512), concerning an altercation he had with an off-duty Houston, Texas Police Officer, (2472), T. J. Smith, who also testified as a rebuttal witness for the Government.

At this time during the trial, it was brought out that Parker, after testifying, made a phone call from the courthouse to his former girl friend, Ms. Myklebust, at her place of work, a law firm, concerning his testimony that he had borrowed her car on the day in question, later that afternoon, and returned to the Diamond Apartments. Parker admonished Ms. Myklebust not to talk to anyone. (2494). See also, (2554, 2604, 2617), concerning this act on the part of Parker.

The cross examination of Vasquez then continued. (2640, 2631).

On redirect examination, Counsel for Petitioner Vasquez then asked questions regarding the Smith incident. (2654).

Barney Ross, Jr., one of the Petitioners in this Cause, then testified. His testimony was cumulative to the others regarding leaving his parents' residence and going to the Diamond Apartments, arriving at the apartment complex, parking his car, moving his car, and then going into Apartment 6-C, with Petitioner Vasquez. (2676). Ross inquired of Sams if he was going to buy his pistol, told Sams the price, $50.00, each, and Sams told him he would purchase Ross' pistol as well as Vasquez' pistol. (2679). Shortly thereafter, Sams and Vasquez walked outside. It was then that Ross heard sounds of gunfire coming from outside. Parsons then entered the living room of apartment 6-C, (1880, 2681), from the back bedroom and fired his gun with the bullets striking Petitioner Ross. Ross also testified to his mistreatment by Parsons, including Parsons' weapon going off near his head, (2682), striking his head, as well as the entry into the apartment by the other officers, including their subsequent mistreatment and abuse of him.

Ross testified the pistol he had, Government Exhibit 7, was given to him by Miss Lou Ann Belle. (2698).

On cross examination, over objection, Ross was interrogated about not having a valid Texas driver's license, (2702), on the day in question, (2706). He testified he did not have a valid Texas driver's license on the day in question when he drove his car from Houston to the Diamond Apartments.

Ross was also questioned, on cross examination, over objection concerning what occupation he put down when he went to a Dr. Fain, (2714), and was also questioned concerning the fact that he did not put down any occupation when he went to a Dr. Shaw. (2715).

It was Ross' position that Parsons did not say anything to him, prior to firing his gun, and that, after Parsons came into the room, Parsons got Ross' gun, turned and fired it in the direction of the bedroom from where he had just come. (2735).

After Ross testified, the defense rested. (2755).

Ms. Tommie Helen Byerley, the apartment manager, also testified. She neither witnessed nor saw anything, but later that afternoon, upon seeing Sams, she called the League City Police Department and asked them why Sams was not in jail. (2069, 2091, 2092).

Over objection, Houston, Texas Police Officer T. J. Smith, who was off-duty at the time, testified regarding the April, 1972, incident involving Vasquez. (2771). See App. S.F. 2771-2820, 2824-2835.

After Smith testified, the Court allowed the Government to call Parker as a hostile witness. (2835). He then changed his testimony and testified that he had not gone to League City in Ms. Myklebust's automobile, but had gone in his brother's automobile. Later, he and Ms. Myklebust went to the hospital in her automobile. (2850).

Jan Myklebust also testified and she testified she knew and had known for some time all of the main parties involved on the defense side of the case. (2856). She testified that on the afternoon in question, July 9, 1972, when all the action, and as noted, where Parker and the

others were at, was taking place in League City, she picked up Parker at his parents' home. (2858). She testified that later that afternoon, after 3:00 O'Clock P.M., (2858), she and Parker went to where Ross and Lou Ann were living. (2859). Ross was not there. Lou Ann was there. Vasquez was not there. She did not remember if Helke was there or not. (2863). She testified that around dusk, or when it was just turning dark, two Latin American males came into the apartment and went into the back bedroom. They called Parker to come back there and Parker, with Ms. Lou Ann, went back there. Ms. Myklebust did not go back there. Ms. Myklebust identified Government's Exhibit No. 15A, a photograph of one John Garcia, as being one of the two Latin-American persons. (2856). Over objection, this exhibit was admitted into evidence. (2870). She also identified Government Exhibit No. 18, a photograph of the other Latin-American, one Robert Dominguez, and this, too, was admitted into evidence over objection. (2876).

Parker then came out of the bedroom, had a conversation with Ms. Myklebust, and then left the apartment. Ms. Myklebust also had a conversation with the two men. Another person by the name of Ledell was also in the house, (2881), and he also left the house with Parker. Ms. Myklebust also left to go and feed her dog. She later returned to the house and then left when Parker returned. The two then went to the hospital where they saw Petitioners Ross and Vasquez. (2885). She did corroborate the fact that Ross "looked like he had been beat up." (2887). She also testified, over objection, (2891), that she had seen Ross wearing the shoulder holster, with the gun in it, at his home. (2889, 2892). She also testified she had seen the person in Exhibit No.

18, Dominguez, at Ross' parents' home, (2893), approximately a month after the day in question. She witnessed that person and Petitioner Ross having a conversation.

As to the conversation she had with Parker, during the trial, over the telephone, she testified Parker told her he did not want her to talk to anyone. Within fifteen minutes of Parker's phone call, Paris, the prosecutor, who knew her, also called her. (2896). Parker, upon arrival at her place of work, also told her to say, if asked, that he borrowed her car on the day in question. (2897).

On cross examination, she testified that she and Parker, after she and her husband had separated commenced having, to the extent of living together, a close relationship. (2916). This relationship changed on her birthday in October, 1972. (2919).

Lilly Sheffer, employee, Montgomery Wards, testified concerning the purchase, on June 12, 1972, of Exhibit No. 5, by a person who gave his name as John Garcia. (2963). Over objection, the gun statement filled out at the time of purchase was introduced. See Exhibit No. 19. (2964). (2969). (2970).

Irvin Richards, employee of Hertz Rent-A-Car, testified in reference to a rental agreement contract for a car that a person by the name of Gloria Ynosencio, on July 7, 1972, rented, with one John Garcia being listed as an additional driver thereon. (2979). This was for a 1972 green Plymouth. (2980). Anna Gloria Ynosencio also testified. She knew John Garcia as well as Dominguez. She and Garcia went to the Houston Intercontinental Airport and rented the car and then Garcia left. She testified that, prior to her and Garcia going to the airport to rent the car, Garcia was brought to her house by persons

driving a red L.T.D. Ford. (2989). She met Dominguez as he was with Garcia when Garcia brought the rental car back to her. (2990).

The above is a synopsis, in the liberal sense, of the seventeen (17) volumes which make up the Statement of Facts of the trial.

REASONS FOR GRANTING THE WRIT OF CERTIORARI AS TO PETITIONER VASQUEZ

It is a fundamental rule of law in all Courts of this land, both Federal and State, that an accused is entitled to be tried for the accusation made in the Government's pleadings. It is beyond cavil and is axiomatic that an accused should not be tried generally for some collateral crime or for being a criminal generally or with having criminal propensities, if he does. Such rule of law is so fundamental that citation of authority is almost unnecessary. However, see *Michelson v. United States,* 335 U.S. 469, ; 1 *Wharton's Criminal Evidence,* Twelfth Edition, Sections 232, 240 (1972); and Volume 22A, *Corpus Secumdum,* Criminal Law Section 682. Thus, as a general rule of law, proof of an extraneous criminal offense is never admissible. There are, of course, exceptions to this stated general and fundamental rule of law. It is, respectfully submitted, that no known exception exists or existed for the admissibility of the extraneous criminal wrong involving the Petitioner Vasquez and the witness Smith in this cause.

In fact, the Fifth Circuit, in *United States v. Pittman,* 1971, 439 F.2d , had this to say about this issue:

> As a general rule, in a criminal case, "the prosecution may not introduce evidence of other criminal acts

of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is man of criminal character." C. McCormick, Handbook of the Law of Evidence § 157 at 327 (1964). The rule is one of long standing in the federal system. See Boyd v. United States, 143 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077 (1892); Fabacher v. United States, 5 Cir., 1927, 20 F.2d 736. It bars the introduction of evidence of other criminal acts of the accused only where the relevancy of such evidence depends on an inference from the other criminal acts to the character of the defendant and thence to the defendant's guilt as charged. Michelson v. United States, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948); 2 C. Wright, Federal Practice and Procedure § 410 (1969). Thus, for example it is established in this Circuit that such evidence "will be received for the purpose of showing knowledge, intent, motive, design or scheme where such element is an essential of the commission of the offense." Ehrlich v. United States, 5 Cir., 1956, 238 F.2d 481, 484; see Weiss v. United States, 5 Cir., 1941, 122 F.2d 675, 681-685, cert. denied, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1941). However, when district courts in this Circuit, in prosecutions involving offenses which require no specific intent for their commission, have admitted evidence of other similar offenses on the part of the accused "to show intent," this Court has reversed. See Hamilton v. United States, 5 Cir., 1969, 409 F.2d 928, (26 U.S.C. § 5295 (a) (2), sale of nontaxpaid whiskey); Baker v. United States, 5 Cir., 1955, 227 F.2d 376 (26 U.S.C. § 5601, illegal operation of a still); Helton v. United States, 5 Cir., 1955, 221 F.2d 338 (Illegal acquisition and production of marijuana); cf. Teate v. United States, 5 Cir., 1961, 297 F.2d 120; McClain v. United States, 5 Cir., 1955, 224 F.2d 522.

> In support of the trial judge's evidentiary ruling in the instant case, the Government offers the standard "knowledge and intent" justification. We have some doubt that it applies here. Sections 4704(a) and 4705(a) of 26 U.S.C. contain no reference to a particular state of mind, and the limited case authority on the point suggests that neither knowledge nor intent on the part of the accused constitutes an element of either offense. See Davis v. United States, 8 Cir., 1962, 306 F.2d 317, cert. denied 372 U.S. 920, 83 S.Ct. 734, 9 L.Ed.2d 725 (1963); Guilbeau v. United States, 6 Cir., 1923, 288 F. 731, 732-733. The Pittmans were not charged with conspiracy, cf. Robinson v. United States, 10 Cir., 1966, 366 F.2d 575, and did not defend on grounds of entrapment, cf. United States v. Cooper, 6 Cir., 1963, 321 F.2d 456, or mistake, cf. Morris v. United States, 5 Cir., 1941, 123 F.2d 957. We are not persuaded that the defendants' knowledge and intent with respect to the alleged transactions were material issues in this trial.

By the trial judge's order in this cause, on what basis could Petitioner Vasquez "join issue" with those issues in the Government's pleadings? See *Michelson v. United States,* supra.

Judge Sobeloff in the decision of *United States v. Baldwin,* 465 F.2d 1277 (4th Cir. 1972), had this to say regarding the admissibility of extraneous criminal wrongs:

> (E)ven where it is conceded that the challenged evidence may be technically fitted into one or more of the exceptions found in the treatises, consideration still should be given to the prejudicial potential of the evidence of other crimes on the minds of the jurors. (Citations omitted). The danger of undue prejudice is not cured merely because the evidence

> falls within an exception to the rule; the prejudice remains inherent in the testimony. Before such prejudicial evidence is to be placed before the jury, the district court must not only decide whether the evidence of prior crimes is independently relevant, but also whether notwithstanding its relevancy, it is not unduly prejudicial and, moreover, is truly needed by the prosecution.

Where in this Cause is the probative value of the extraneous criminal wrong and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan? See *Morgan v. United States,* 355 F.2d 43 (10th Cir. 1966).

Where is the relevancy to the issues as framed by the Indictment?

> The concept of relevancy in legal proof is based upon the concept of the dependent event. Since relevancy is probative worth and not really a rule of evidence, it establishes a 'connection' or 'relationship' between event A and event B. Contrariwise, 'irrelevant material' establishes no probative relationship between event A and event B. That is, event A and event B are independent; the happening of one in no way affects the outcome of the other." *Land and Water Law Review,* Volume 8, at pages 289-290.

The extraneous criminal wrong of the Smith incident is without legal relevance to the issue of whether Petitioner Vasquez committed the criminal wrong charged. The evidence of the other crime must be relevant on some theory other than the general proposition that one who commits one crime is prone to commit another.

Is not, however, a graver issue involved herein and that being the failure to give the accused notice that a prior criminal wrong is going to be used against him? See *Boyd v. United States,* 143 U.S. 450.

Thus and in conclusion, Petitioner Vasquez respectfully submits that the Writ should be granted in order to determine when and under what circumstances, in Federal Court, a prior extraneous criminal wrong is admissible, either during the Government's main case in chief or on rebuttal, and also determine if there is some sort of pre-trial notice requirement to the accused of the Government's intent to introduce into evidence at the trial evidence of an extraneous criminal wrong. For this reason, if no other, the writ should issue.

QUESTION PERTAINING TO BOTH PETITIONERS

WHETHER THE TRIAL COURT JUDGE VIOLATED PETITIONERS', VASQUEZ AND ROSS, RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BY ENTERING A PRE-TRIAL ORDER PROHIBITING EITHER THE PETITIONERS OR THEIR COUNSEL FROM ASKING QUESTIONS AND GIVING ANSWERS AND TESTIMONY WHICH WOULD HAVE SHOWN THE PETITIONERS DID NOT KNOW THAT THE COMPAINANTS, FEDERAL AGENTS PARSONS AND ALVAREZ, WERE IN FACT FEDERAL OFFICERS, WHO WERE ALLEGEDLY ASSAULTED AND WHICH ASSAULTS WERE MADE THE BASIS OF THE CHARGES AGAINST THE PETITIONERS?

This question is presented in light of this Honorable Court's recent decision of *United States v. Feola,* No. 73-

1123, 16 Cr. L. Rep. 3107, Majority Opinion by Mr. Justice Blackmun. The statute involved here, 18 U.S.C. Section 111, was also involved in that cause with the exception the offense there was alleged pursuant to Section 371 and the offense was that of a conspiracy to assault a federal officer while engaged in the performance of his official duties. The Court held that knowledge that the intended victim was a federal officer was not a requisite for the crime of conspiracy to commit an offense violative of Section 111.

Like charges given in Feola, supra, were also given in this cause. However, there is no mention in Feola, supra, that a like pre-trial order was entered. Here, the trial court's order read: "That [the] defendants shall not make statements, and that their counsel not ask questions nor make statements, which indicate that defendants did not know that the persons they assaulted were federal officers." (See Court of Appeals Appendix, Tr. R. 33-34).

In Feola, supra, Mr. Justice Blackmum, for the majority of the Court, concluded that: "All the statute requires is an intent to assault, not an intent to assault a federal officer."

However, His Honor also had this to say:

> We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration § 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the de-

> fendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.
>
> We hold, therefore, that in order to incur criminal liability under § 111 an actor must entertain merely the criminal intent to do the acts therein specified. We now consider whether the rule should be different where persons conspire to commit those acts.

Feola, supra, of course, was a conspirarcy to commit an assault case. The cause at Bar is that of the substantive offense of actually committing assaults on particular type Federal officers.

> "We hold here only that where a substantive offense embodies only a requirement of mens rea as to each of its elements, the general federal conspiracy statute requires no more."
>
> . . .
>
> "Our analysis of the substantive offense in Part II, supra, is sufficient to convince us that for the purpose of individual guilt or innocence, awareness of the official identity of the assault victim is irrelevant."

His Honor issued a caveat however:

> Again, we point out, however, that the state of knowledge of the parties to an agreement is not always irrelevant in a proceeding charging a violation of conspiracy law. First, the knowledge of the parties is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense. Second, whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the existence of federal jurisdiction. The jurisdictional requirement is satisfied

> by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked.

The issue attempted to be presented by way of this Application for Writ of Certiorari is whether a trial court judge may prohibit an accused from testifying or offering evidence that he did not know the assaulted party was a federal officer had no reason to know that the victim was other than a private citizen, or less. Cf. *Fernandez v. United States,* No. 73-6868, Certiorari Denied, 16 Cr.L. Rep. 4225; and Mr. Justice Stewart's dissent, joined by Mr. Justice Douglas, in Feola, supra.

The gravaman of the complaint here is that if the trial judge's pre-trial order prohibiting asking questions and the receipt of answers that would have indicated that the Petitioners did not know that the persons assaulted were federal officers does not impose "strict liability" on an assailant, then Petitioners are not quite sure what the phrase "strict liability" means. This is not the same question whether scienter is neither a necesary element of the Indictment nor of the Government's proof in an 18 U.S.C. Section 111 type case. Is the coin a one-sided one? Here, neither Parsons nor Alvarez, the complainants, said or used the magic words "Federal Officers." "Hold it." They simply said: "Police. Hold it." (Page 677 of the Statement of Facts of the trial). The Petitioners were delimited to only testifying that the complainants did not make this statement. The Petitioners were prohibited, by the trial court's order, from testifying that the complainants did not make this statement. The Petitioners were prohibited,

by the trial court's order, from testifying that they did not know nor had knowledge the Compainants were Federal Officers. Is the accused, in a trial to a jury, not entitled, as part of his defense, to show to the jury all of the facts, as seen through his eyes, the same as the prosecution witnesses may do so. With all of the information, is it not then up to the jury to deceide whether a person is guilty or not guilty of the alleged wrong?

If Congress did not intend for the Government to have the burden of showing knowledge on the part of one who allegedly asaults a Federal Officer, is the same true, defensively, where the Federal Officer, through choice or by duty, conceals and masks his identity from the general public? It is submitted there is a difference and the difference is one with meaning.

It is respectfully submitted that this Honorable Court, in Feola, supra, did not hold that it is completely unimportant whether either or both of these Petitioners did or did not know or have reason to believe or know the assaulted parties were agents of the Bureau of Narcotics and Dangerous Drugs.

In short, Petitioners say that if the officials of the United States Government elect to prosecute a person for an alleged violation of Section 111, then, even though they need not allege knowledge in the Indictment and need not prove knowledge by their case, nevertheless, the accused should be entitled to present all of the facts from his standpoint including but not limited to the fact that he did not know nor had reason to know that the parties subsequently shown to be assaulted were in fact Federal Officers.

CONCLUSION AND PRAYER

For all the reasons stated above, the Petitions for Writ of Certiorari, by the Petitioners, Vasquez and Ross, should be granted and the convictions and sentences of each of the Petitioners be set aside.

Petitioners pray for such relief.

Respectfully submitted,

MARVIN O. TEAGUE
Counsel for Petitioners
999 State National Building
412 Main Street
Houston, Texas 77002
222-1728

JON HUGHES
Counsel for Petitioners
609 Fannin
Houston, Texas 77002
225-0666

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNITED STATES V. BARNEY ROSS AND RICHARD VASQUEZ

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3848

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BARNEY ROSS and RICHARD VASQUEZ,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas.

(March 7, 1975)

Before WISDOM and DYER, Circuit Judges, and KRAFT, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] Barney Ross and Richard Vasquez appeal their convictions of asaulting federal officers. They raise four points of error. First, they contend that it was error for the trial court to admit into evidence the prior conviction of one of the defense witnesses. They also contend that the trial court erred in ordering that the defense might not testify or elicit

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

testimony to show that the defendants did not know that the persons they allegedly asaulted were federal officers. They further contend that the trial court erred in permitting testimony of a police officer that he had been assaulted on a previous occasion by the appellant Vasquez. Finally, they contend that the trial court erred in permitting the prosecution to question the defendant as to whether he had a valid driver's license at the time of the alleged offense. Finding no reversible error, we affirm.

APPENDIX B

CORRESPONDENCE FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
REGARDING THE PETITION FOR REHEARING
FILED IN UNITED STATES v.
BARNEY ROSS AND RICHARD VASQUEZ

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

June 24, 1975

TO ALL COUNSEL OF RECORD

No. 73-3848-U.S.A.-v.-BARNEY ROSS and
RICHARD VASQUEZ

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

by CLARE F. SACHS
Deputy Clerk

cc: Mr. Marvin O. Teague
Mr. Jon N. Hughes
Ms. Mary L. Sinderson

CERTIFICATE

I, MARVIN O. TEAGUE, Attorney for Petitioners, BARNEY ROSS AND RICHARD VASQUEZ, hereby certify that one (1) copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Respondent's Attorney, HONORABLE EDWARD McDONOUGH, by placing the same in the United States Mail, postage prepaid, 515 Rusk, Houston, Texas 77002, on this the _____ day of July, 1975.

MARVIN O. TEAGUE

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-117

BARNEY ROSS and RICHARD VASQUEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in ordering defense counsel to refrain from asking petitioners whether they knew that the victims of their assaults were federal officers. Petitioner Vasquez also contends that the district court should have excluded testimony regarding a separate act of misconduct he committed.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of assaulting federal officers, in violation of 18 U.S.C. 111, and sentenced pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. 5010(b) and 5017(c). The court of appeals affirmed without opinion (Pet. App. A; 510 F.2d 383).

1. Following his arrest by local police in June 1972 for narcotics offenses, Paul Sams agreed to serve as an informant (Tr. 896). The evidence at trial, now taken in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), demonstrated that on July 2, 1972, Sams telephoned Officer Nick Fatta, introduced Ross Hart, and stood by while Fatta negotiated with Hart for the purchase of a quantity of marihuana (Tr. 899). On the morning of July 9 a group of local and federal officers arrived at the Diamond Apartments in League City, Texas, expecting Sams to take delivery of marihuana. All of the officers and agents were dressed in civilian clothes. Several of the agents took up positions around the building; Agent Robert Parsons hid in a rear bedroom of apartment 6-C, where the transaction was to take place (Tr. 618-621).

At 3:45 p.m. petitioner Ross arrived (Tr. 208, 217). Another car (the Hart car) arrived, carrying Sams, Ross Hart, and petitioner Vasquez. All four men walked to apartment 6-C (Tr. 223-224). Shortly thereafter Vasquez and Hart left the apartment and

walked to the Hart car. Ross left the apartment and drove his own car to a spot adjacent to the Hart car (Tr. 225-227). Ross removed three shopping bags from the trunk of his car. Petitioners and Hart each carried a bag to apartment 6-C (Tr. 228).

Agent Parsons, still hidden in the bedroom, saw petitioners and Hart enter the apartment and heard one of them say that they were armed (Tr. 670). Sams and petitioner Vasquez left the apartment to obtain the purchase money, which Sams told petitioners he had hidden in the trunk of a car (in fact an unmarked police car) (Tr. 662-663). The officers and agents had arranged with Sams that Sams would not open the trunk until the marihuana had been delivered (Tr. 256-257).

When the trunk was opened, the officers and agents drew their weapons and converged on Sams and Vasquez. As they approached Vasquez, Officers Fatta and Mullican yelled "Police Officers" (Tr. 851, 1064, 1162). Petitioner Vasquez drew a pistol and fired at Agent Alvarez. The officers and agents returned the fire, wounding Vasquez in his right arm. Vasquez fired no additional shots.

Inside the apartment Agent Parsons, hearing the gunshots, decided to arrest Ross and Hart. On emerging from the bedroom Parsons, with gun drawn, identified himself as a police officer. Petitioner Ross fired at Parsons; Parsons returned the fire, striking Ross twice in the knee and grazing his scalp. None of the five rounds fired by Ross struck Parsons (Tr. 677-679, 681, 800).

2. Prior to trial the district court ruled that it was irrelevant whether or not petitioners knew their victims were federal officers; the court stated that "Defendants shall not make statements and their Counsel shall not ask questions or make statements which indicate that Defendants did not know that the persons they assaulted were Federal officers" (Tr. 42). The court explained that this ruling simply preventing counsel from asking petitioners on the stand, "Did you know at the time that he was a Federal officer?" (Tr. 44). Counsel were not prohibited from inquiring whether petitioners had known or seen the victims beforehand; only "the $64 question" containing the term "Federal officer" was barred (Tr. 44). Petitioners argue (Pet. 26-30) that this restriction was improper.

Petitioners rely upon the Court's caveat in *United States* v. *Feola*, 420 U.S. 671, 686, that knowledge of the federal employment of the person assaulted conceivably could be relevant in the exceptional case where an individual assaults a federal officer in the honest but mistaken belief that he was resisting an unlawful use of force. Petitioners' defense involved no such claim. Petitioner Ross contended that he never fired a shot (Tr. 2684), and petitioner Vasquez contended that he discharged his pistol accidentally (Tr. 2454) without ever having aimed it at anyone. Moreover, the district court clarified its order to permit counsel to inquire into petitioners' knowledge (or lack of knowledge) that the persons they assaulted were law enforcement officers (Tr.

37-44). Counsel was at liberty to ask questions designed to establish that petitioners believed they were defending themselves from an assault by private parties. This case therefore is controlled by *Feola's* central holding: knowledge that the assault victim was a federal officer (as opposed to a state officer) is irrelevant.

3. Testifying in his own defense, petitioner Vasquez was shown a photograph taken three months before the shooting incident, following his arrest by Houston police officers for intimidating an off-duty detective (Tr. 2464-2467). Acknowledging that he was the person in the photograph, Vasquez denied that the arrest was the result of misconduct on his part (Tr. 2467-2478). That testimony was in turn impeached by the detective himself, who testified that in April 1972 petitioner Vasquez, after skidding to avoid the detective's car on a freeway, followed the detective's car and, at a traffic light, left his own car and entered the detective's car. When the detective drew his gun and identified himself, Vasquez remarked "A cop—if I had known that, I would have killed you" because, although he had killed Viet Cong while on military duty, his "real desire" was to kill a policeman (Tr. 2773-2806).

Petitioner Vasquez contends that the court should not have allowed the detective to give this testimony. But the testimony was pertinent because it impeached petitioner Vasquez's testimony; it also demonstrated petitioner's intent to assault the federal officers. The

district court did not abuse its discretion by allowing this collateral inquiry.

In any event, any claim regarding the detective's testimony has been waived by defense counsel. After Vasquez had been cross-examined on the incident, the trial was delayed for about a week. When it resumed the court offered to instruct the jury to disregard Vasquez's testimony regarding his own misconduct. Defense counsel objected, indicating his intention to develop the matter further on redirect examination "without waiving any position initially taken that the matter should not have been gone into in the first place" (Tr. 2638). The district court responded: "I don't believe you can have your cake and eat it, too, Mr. Haynes" (*ibid.*). Petitioner Vasquez's counsel pursued the matter in detail (Tr. 2654-2659), and only thereafter did the prosecution call the detective and elicit the testimony to which Vasquez now objects. In these circumstances, petitioners cannot complain that the prosecutor called the detective to rebut Vasquez's account of the incident.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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